IN THE SUPREME COURT OF WASHINGTON

No. 83024-0

Court of Appeals No. 60528-3-I

Bellevue School District,
Petitioner

v.

E.S.

Respondent

Respondent's Answer to Petition for Review and Answer to Motion to Accelerate Review on the Merits

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LAW REVIEW & OTHER ARTICLES

I. Introduction

The Bellevue School District has filed a petition for discretionary review of the Court of Appeals decision that "A proceeding to declare a child truant affects the child's rights to liberty, privacy, and education. Due process requires that the child be afforded counsel." Bellevue Sch. Dist. v. E.S., 148 Wn. App. 205, 207 (2009).

This Court should deny discretionary review because the Court of Appeals decision correctly applies controlling case law including Mathews v. Eldridge, 424 U.S. 319 (1976). There is no Washington case contrary to the decision in E.S. The decision follows the reasoning of Mathews and conducts the due process analysis that the Court of Appeals did not conduct in Truancy of Perkins, 93 Wn. App. 590, review denied, 138 Wn 2d 1003 (1999). Washington law already had provided counsel to children in other "status offense" proceedings (CHINS and At Risk Youth). Other states provide counsel to alleged truants. The right to counsel for children in court proceedings has been well established since In re Gault, 387 U.S. 1 (1963).

Should the Court grant review, there is no need to accelerate review, as the primary concern raised by the

district, that the legislature can amend laws and appropriate funding (Motion to Accelerate, page 4), can be addressed by the legislature without any further appellate court decision.

II. Issue Presented

This case presents the issue whether a 13-year-old child, whose mother requires an interpreter, is entitled to appointed counsel in a truancy court proceeding in which the opposing party is a governmental entity and her constitutionally protected interests in liberty, privacy, and education are at stake.

III. Statement of the Case

Because counsel was not provided to her at the first court hearing, the Court of Appeals vacated the truancy finding made by the King County Superior Court against E.S. At the initial truancy hearing, the transcript of which occupies only six pages, one of which contains greetings and the oath of the interpreter, the court obtained from the child and her mother a waiver of a contested hearing, heard no sworn testimony and received no physical evidence to support the truancy petition, and accepted the child's and her mother's agreement that there should be a court order, without either fully explaining what the order could mean or what defenses E.S. might have in the hearing. Verbatim Record of

Proceedings ("VRP"), 3/6/2006 at 1-6. At no time did the court conduct a colloquy designed to determine whether in fact E.S. understood the nature of the proceeding or her rights or the details of the agreement she was making. There was no lawyer available to advise E.S. nor did the court offer the services of a lawyer.

The trial court did not address the facts alleged in the petition and the circumstances of the child, nor did it address how its order would "most likely cause the juvenile to return to and remain in school...." *See* RCW § 28A.225.035. It was not until *after* E.S. and her mother had agreed that there should be a court order for E.S. to attend school, and the Court had assumed jurisdiction for one year, that the Court explained possible consequences for being found in contempt of the order. VRP 3/6/2006 at 3.

Based on the initial truancy finding obtained without evidence, counsel, or a contested hearing, the school district obtained a court order finding E in contempt. The court denied a CR 60 motion to set aside the original finding. CP 187-188. The Court of Appeals vacated the truancy finding. The district's motion to reconsider was denied, and the district filed a petition for discretionary review.

IV. Argument

The Alleged Uncertainty Among Prosecutors and Legislators Is Not a Reason to Grant Review

The district argues that unless this Court takes review,

> legislators will be unsure whether, or how, the law needs to be modified, and superior courts, counties, school districts, and prosecutors will continue to operate under a cloud of uncertainty regarding the precise scope of the right to counsel in juvenile civil proceedings.

Petition at 3-4.

This distorts the impact of the Court of Appeals decision and is not a reason to grant review. The Court of Appeals decision is not confusing. If a school district files a truancy petition, counsel must be appointed. There is no uncertainty about the scope of the right to counsel. How the funding for counsel is provided is beyond the scope of the Court's decision and is not an issue in this case. As the Court of Appeals noted, the child's counsel and amici argued that "even a small reduction in contempt proceedings and detention time could result in savings enough to balance the books." 148 Wn. App. at 219. The Court noted that it could not evaluate that claim or the district's claim about costs, and that "'[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard.'" Id., footnote omitted.

According to a recent study, school districts do not file petitions at all for 68 percent of students who are legally

eligible based on repeated unexcused absences. Klima, Miller, and Nunlist, Washington's Truancy Laws: School District Implementation and Costs (February, 2009), available at http://www.wsipp.wa.gov/pub.asp?docid=09-02-2201. Rates of filing vary widely among the districts. Id. As the districts already had been taking varied approaches to truancy, Bellevue's claim of concern has less impact. Bellevue itself only filed petitions in 24 per cent of eligible cases. Id. at p.9. Twenty-two districts filed no cases at all in the 2007-08 school year, including Central Kitsap, with a student population of 11,190. Mercer Island, with 3784 students, filed only two petitions when 90 students were eligible for a petition under the statute. Id.

Another recent report noted that the Vancouver district uses "discretion in dealing with youth with complex issues, of which truancy may just be a symptom", and it does not file as often as other districts. See, AN ANALYSIS OF CHARACTERISTICS OF YOUTH REFERRED TO THE CLARK COUNTY TRUANCY PROJECT, 2007-2008 Results from Vera/WSU Data Collection and Analysis, Jennifer Fratello, Vera Institute, at p. 3.

There is no urgency requiring this court to act. Despite the district's claim that there is uncertainty regarding

how to administer the statutory truancy program (Petition at 3), the district's counsel, the King County Prosecutor, states on its web page that it

> is working with school districts, the Court, and public defenders to preserve resources and divert truancy cases from court to truancy workshops, where school representatives can continue to work with students and their parents to get kids back in school.

http://www.kingcounty.gov/Prosecutor/news/2009/march/truants.aspx

If this Court denies review, there will be no confusion and the legislature can decide whether it wants to keep the statute, amend it to emphasize that court should be the last resort for truant children, or find a non-judicial way to help children and families address the underlying causes of truancy.

The Purported Cost of Implementing a Constitutional Right is not a Reason to Deny It

The district complains about the purported cost of providing counsel to children, claims without authority or citation that "there is currently no funding stream" to provide lawyers, and laments that the courts are in "disarray" and that the legislature will not know how to amend the statutes. Petition at 13-14. Yet the district also acknowledges that "if the Constitution requires counsel, cost is not a reason to withhold counsel." Id., at 13.

This Court has stated that "Lack of funds does not excuse a violation of the Constitution, and this court can order expenditures,

if necessary, to enforce constitutional mandates." Braam v. State, 150 Wn.2d 689, 710 (2003).

Similar claims of "the sky is falling" were made when the United States Supreme Court considered the right to counsel in misdemeanor cases in Argersinger v. Hamlin, 407 U.S. 25 (1972) . The Solicitor General commented on the "chaos" which could result from any mandatory requirement of counsel in misdemeanor cases. 407 U.S. 25, 56, Powell,J., concurring. Nevertheless, the Court announced its rule requiring counsel.

Similarly here, the unsupported claim that courts and the legislature will be in disarray is not a reason for this Court to accept review. The truancy court process that the Court of Appeals accurately described, which "is not a portrait of equivalent advantages before the court", will benefit from the reconsideration that comes after an appellate court opinion. Cost was the only countervailing government interest that the district raised in its arguments. E.S., 148 Wn. App at 219.

Any time an appellate court announces an interpretation of the law that is different than what trial courts have done, the trial courts must adjust and the legislature may choose to respond with laws to help implement that interpretation. That is not a reason to take review of a well-reasoned opinion. The Argersinger opinion potentially affected millions of cases, 407 U.S. 25 at fn. 4, and that

was more far-reaching than the thousands of cases referenced by the district herein. In Alabama v. Shelton, 535 U.S. 654, 665 (2002), the *amicus* complained that "'hundreds of thousands' of uncounseled defendants receive suspended sentences", but the Supreme Court ruled that those hundreds of thousands of people must have counsel at the time of adjudication or they could never be incarcerated based on that adjudication.

The Court in Shelton offered advice that the district in this case might follow. It noted that "States unable or unwilling routinely to provide appointed counsel to misdemeanants in Shelton's situation are not without recourse to another option", which it described as pretrial probation, which would occur prior to adjudication. Shelton, 535 U.S. 654, 671.

In fact, the Washington truancy statute requires that school districts take alternative actions prior to filing a petition. RCW 28A.225.020 requires that school districts *shall*

> Take steps to eliminate or reduce the child's absences. These steps shall include, where appropriate, adjusting the child's school program or school or course assignment, providing more individualized or remedial instruction, providing appropriate vocational courses or work experience, referring the child to a community truancy board, if available, requiring the child to attend an alternative school or program, or assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school.

A district can refer the child to a community truancy board or assist her with obtaining supplementary services to address the underlying causes of the truancy. It does not have to go to court. Non-court interventions, which are more effective, remain available. See TeamChild amicus brief in Court of Appeals, page 5, fn. 7.

The District Misapprehends the Holding of E.S. and the Case law on Juvenile Rights

The district cites Lassiter v. Dept. of Social Servs. 452 U.S. 18 (1981), not for its holding that there is a case by case right to counsel in termination proceedings, but for the general proposition that the right to counsel exists only if liberty is at stake. Petition at 6. Lassiter itself uses the Mathews balancing test. 452 U.S. at 26.

The district cites Dependency of Grove, 127 Wn. 2d 221(1995), for the proposition that in a civil case the right to representation is presumed to be limited to cases in which physical liberty is threatened. Petition at 7. But the holding in Grove did not involve a child facing a truancy proceeding. It related to *statutory* rights to counsel, and the Court noted in a footnote:

> We, therefore, find it unnecessary to engage in an analysis of any parallel constitutional right. Whether litigants involved in these kinds of actions also would have a constitutional right to counsel is not before us. We note, however, that this court has determined that an indigent parent in a dependency action has a constitutional right to counsel at trial at public expense. In re Myricks, 85 Wn.2d 252, 255, 533 P.2d 841 (1975); but see Lassiter v. Department of Social Servs. 452 U.S. 18, 31, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981) (right to counsel in child termination proceedings is guaranteed by the federal constitution only in limited circumstances). We also have held there is a

> constitutional right to counsel in a civil proceeding which may result in the defendant being physically incarcerated. Tetro v. Tetro, 86 Wn.2d 252, 254-55, 544 P.2d 17 (1975).

Dependency of Grove, 127 Wn.2d 221, 229.

The Court wrote that because the interest at stake was a financial one involving worker compensation, not a "fundamental" constitutional right, there was no constitutional right to counsel. Dependency of Grove, 127 Wn.2d 221, 238.

This Court also has provided greater rights than did the U. S. Supreme Court in Lassiter and does not limit counsel to cases involving physical liberty. Lassiter held that there is a case by case right to counsel in termination proceedings. 452 U.S. 18, 31-32. But this Court simply held that counsel is required. In re Myricks, 85 Wn.2d 252 (1975). The Court of Appeals herein properly identified other fundamental liberty interests of the child at stake in truancy court proceedings that require counsel.

The district also cites In re Marriage of King, 162 Wn.2d 378 (2007). Petition at 8. This Court, denying appointed counsel for an adult in a dissolution case, wrote in King: "The dissolution proceeding is a private civil dispute initiated by private parties to resolve their legal rights vis-à-vis each other and their children." 162 Wn.2d 378, 385. The Court emphasized that "The proceeding is not instituted by the State." Id. at 386. A truancy case is quite different, as it is initiated by an arm of government, a school district,

and in many cases, including this one, the prosecutor either represents the district throughout the case or advises the district representatives.

The district cites Schall v. Martin, 467 U.S. 253 (1984) for the proposition that juveniles have a diminished liberty interest and a lesser right than adults. Petition at 8. The Schall court holding was that limited preventive pretrial detention of children accused of crime, *safeguarded by a hearing and the right to counsel,* did not violate due process. It does not support denial of counsel in a hearing that engages liberty, privacy, and education rights.

The district misunderstands the issue in this case. It argues that children have fewer rights than adults, and proceeds to cite United States Supreme Court cases involving school disciplinary administrative hearings, Goss v. Lopez, 419 U.S. 565 (1975), civil commitment, Parham v. J.R., 442 U.S. 584 (1979), and jury trial in criminal cases, McKeiver v. Pa., 403 U.S. 528, (1971). None of these cases is apposite.

The Goss Court found that children facing suspension from school need an opportunity to give their version of events, to avoid an erroneous deprivation of their rights. It wrote, "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing

to him," the minimal requirements of the Clause must be satisfied." 419 U.S. 565, 574, citation omitted.

It is true that the Court in Goss wrote, "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel...."419 U.S. 565, 583. But it was addressing short term disciplinary decisions by a school administrator in which no hearing had been provided, not the situation here in which a statutory judicial hearing is provided. It also noted:

> Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

Goss v. Lopez, 419 U.S. 565, 584.

In Parham, the parent was seeking to commit the child, and in this case, the government, by a school district, seeks to find a child truant. The Parham court wrote:

> We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied. ...That inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the

> authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.

Parham v. J.R., 442 U.S. 584, 606-607[citations omitted].

This Court provided protections for children in commitments initiated by parents in State v. CPC Fairfax Hospital, 129 Wn.2d 439, 455 (1996): "Fairfax Hospital officials and T.B.'s parents could not hold T.B. in the hospital against her will without filing a petition for involuntary commitment in court." (Dolliver, J., concurring, emphasizing the statutory basis for the holding.) The Court held that the child "has suffered an unconstitutional deprivation of her liberty including her right to access counsel". 129 Wn.2d 439, 441.

Unlike in Parham, Washington provides for a hearing for children charged with truancy. The question is not whether a hearing is required but what process is due when an adversary judicial hearing is provided.

In McKeiver, while the Court did not find that a child had a right to a jury trial in a criminal case, it quoted with approval Justice Fortas from his holding in In re Gault, 387 U.S. 1,13 (1967): "... neither the Fourteenth Amendment nor

the Bill of Rights is for adults alone." McKeiver v. Pa., 403 U.S. 528, 531-532. The Court also wrote:

> Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination. ...

McKeiver v. Pa., 403 U.S. 528, 533.

The E.S. Court properly concluded:

> The initial truancy hearing provides no procedural safeguards to protect the child's rights, and it is undeniable that the child cannot be expected to protect them herself. Errors in the proceedings are therefore likely, and the risks to the child's liberty interests are great. Representation is required....

148 Wn. App. at 219.

The District Does Not Understand the Value of Counsel

The district questions the value of counsel in protecting children's rights and refers to its argument in its motion to reconsider. Petition at 9. In that argument, the district dramatically misunderstood what is at issue in a truancy proceeding and the role defense counsel can play. It asserted that "the child's goal is to avoid school." Resp. Motion at 27. This demonstrates a lack of understanding of the many emotional, psychological, and physical disorders that can lie at the cause of truancy. Quite often, the child in a truancy case needs and wants help, whether it be to find a different school, a different class schedule, counseling, or transportation to school.

A defense attorney who can gain the trust of a child can probe the reasons for her truancy, consult with counselors and school officials, and present alternatives to the court. In addition, in cases in which the school has not met its statutory obligation to take steps to ameliorate the truancy, the lawyer can raise that with the court.

TeamChild, in its practice manual for truancy attorneys, notes the value of defense advocates:

> Research and experience of advocates across the state indicate that many of the underlying reasons for a child's absences require solutions and support that are unavailable to families without advocacy. Attorneys play a critical role in identifying issues impacting a child's engagement in school, making the court and schools aware of the child's needs, and holding the systems accountable to meeting those needs.

Defending Youth in Truancy Proceedings, at vii (2008).

The district asserts that there is no reason to assume that adding a lawyer "will uniformly improve the process". Resp. Motion at 27. Yet it suggests that districts and courts "perform admirably under very difficult circumstances". Id. It simply ignores the reality that in a hearing that consumes only a few minutes, with no adult to advocate for the child or to test the school's actions, there is no way for a court to make a reasoned decision about, for example, ordering the child to change schools or to enroll in an alternative education program, which the statute permits. Amicus TeamChild pointed out the grave adverse effects that such an ill-informed decision could have.

A lawyer with the time to learn about the child and her family, to talk with school officials, to engage a social worker to assess the child and develop alternatives, can benefit not only the child but also the court by providing full information to the court. As TeamChild explained in its brief, counsel can also advise the court when there is a conflict between special education staff and truancy staff so that the court can understand the real causes for truancy.

A judge in Atlanta who developed a truancy diversion program "concluded that truancy often arises out of familial conditions and that one of the reasons truancy was so difficult to reverse was that the court orders did not address those issues." Truancy, Literacy and the Courts, A User's Manual (2001), p. 3, available at http://www.abanet.org/subabuse/truancy_brochure.pdf. The district's language about a child's goals to avoid school is totally at odds with this judge's experience.[1]

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[1] In an appendix to a joint Washington State Bar –American Bar Association report on juvenile public defense, the authors described both the problems that can occur when a disabled child is unrepresented and what a lawyer can do to defend such a child.

> During courtroom observation for this report, one child with a first grade reading level appeared before the court for a contempt motion. The defense attorney was able to prevent the child from being held in contempt with expert testimony from the school counselor. The child was functionally illiterate and severely cognitively delayed, yet had been allowed at an earlier hearing to sign a petition agreeing that she was truant and that she would abide by a list of conditions. No one read to her or even explained to her what she was signing. One of the conditions was to attend school. She did go to school regularly, but she did not go to class. She believed she was in compliance; no one took the time to explain that attending school also meant attending classes.

The idea advanced by the district, that a lawyer "may thwart efforts to end the child's truancy before it becomes chronic" assumes that the school districts are fully complying with the statute and have adequate resources available to help children and that lawyers are not focused on helping their clients. Resp. Motion at 28-29. Neither assumption is correct. [2]

The Court's language in In re Gault is helpful to understand the importance of counsel in the truancy context:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel' at every step in the proceedings against him." 387 US 1, 81, 37.

Provision of Counsel To Children Charged With Truancy is Not a Novel Concept

Contrary to the prosecutor's assertion [petition at 8], the right to counsel for children in truancy proceedings is *not* a novel or unique idea. For example, Massachusetts addresses truancy in its "Child in need of Services" proceedings, ALM GL ch. 119, § 21, and children are entitled

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An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters, Appendix, Representation Of Status Offenders In Washington State Courts (2003), p. 71.

[2] A recent evaluation of a legal aid program for children in dependency cases in Florida found that children represented by the lawyers had higher rates of adoption and long-term custody without being offset by significantly lower rates of reunification. Zinn, A. E. & Slowriver, J. (2008) *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County.* Chicago: Chapin Hall Center for Children at the University of Chicago.

to counsel, including court appointed counsel. G. L. c. 119, § 39F. In re Hilary, 450 Mass. 491, 496-497 (2008).

Similarly, New Hampshire includes truancy in CHINS and provides counsel. RSA 169-D:2, RSA 169-D:12

In Minnesota, truancy is handled as a CHINS matter and when the sole basis for the petition is habitual truancy, "before any out-of-home placement, including foster care or inpatient treatment, can be ordered, the court must appoint a public defender or other counsel at public expense..." Minn. Stat. § 260C.163.

In Arizona, truancy is addressed in the incorrigibility statute. An "incorrigible child" is a child who is "habitually truant" from school as defined in ARS § 15-803C. ARS § 8-201. In Lana A. v. Woodburn, 116 P.3d 1222 (Ariz. App. Div. 1, 2005), the Arizona Court of Appeals held:

> A juvenile charged with an incorrigibility offense has the right to an attorney under Arizona law. When a juvenile is deprived of the right to counsel at her incorrigibility hearing, she cannot be detained in later proceedings related to that incorrigibility offense.

Lana A. v. Woodburn, 211 Ariz. 62, 66. The court based its holding on a statutory analysis. The holding is quite similar to that in Shelton, supra, and consistent with E.S.

Wisconsin treats truancy under its "juvenile in need of protection or services" statute. Wis. Stat. § 938.13. The

child must have counsel before a court can place a child outside of the home. Wis. Stat. § 938.23

In Alabama, an alleged child in need of supervision, including a child alleged to be truant, "has the right to be represented at all stages of the proceedings by a child's attorney retained by them or, if they are unable to afford a child's attorney, by a child's attorney appointed by the juvenile court." Ala. Code Sec. 12-15-210(a) (2009).

Nevada also treats truants as children in need of supervision. Nev. Rev. Stat. Ann. § 201.090 (2008).It provides counsel for those children at all stages of the proceedings. Nev. Rev. Stat. Ann. § 62D.030 (2008).

In Oregon, there is no law authorizing custody for truancy, although there is a compulsory school attendance law. ORS 339.010 – 339.090. A parent or guardian may be cited if a child does not attend school in compliance with that law. ORS 339.990 (failure to send or maintain a child in school is a Class C violation). State Ex Rel Juvenile Dep't v. J. D., 164 P. 3d 1182, 1184, fn.10 (Or. Ct. App. 2007).

None of these states has a statute exactly like Washington's, which allows prosecution of a child for truancy followed by a contempt proceeding. But they are informative

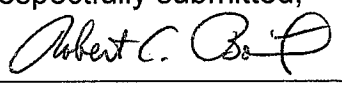
on the importance of having counsel from the beginning of a proceeding that can lead to incarceration.[3]

V. Conclusion

Justice Powell, concurring, wrote in Argersinger, "I emphasize my long-held conviction that the adversary system functions best and most fairly only when all parties are represented by competent counsel." 407 U.S. 25, 65. The Court of Appeals in E.S. recognized that a child cannot protect her own interests in a courtroom particularly when she is faced by the resources of the school district and is confronted by a legal system the terms of which she likely does not understand. Errors are likely and the risks to the child's interests are great. Counsel is required.

This Court should deny the motion for discretionary review because the decision of the Court of Appeals was correct and relied on established authority.

Respectfully submitted,



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[3] The fact that the director of the clinic at Seattle University told a reporter that he was unaware of the requirements in other states, as emphasized by the district in its petition at page 10, does not support the suggestion that counsel for E.S. believes that this Court should accept review.

CERTIFICATE OF SERVICE

I, Alicia Reise, under penalty of perjury under the laws of the State of Washington, state that on May 15, 2009, I caused to be served on the persons listed below the Respondent's Answer to Petition for Review and Answer to Motion to Accelerate Review on the Merits by the methods so designated.

Dated this 15th day of May, 2009.

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